The Public Lawyer

STATE BAR OF NEVADA

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Yellow Cab of Reno v. Second Judicial Dist. Court, 127 Nev. Adv. Op. No. 52 (August 4, 2011) On November 10, 2010, this court entered an order denying this petition for a writ of mandamus. Petitioner timely petitioned for rehearing, which, after real parties in interest filed an answer, we granted in a summary order on March 10, 2011. We granted rehearing because we overlooked a material question of law regarding the application of NRS 706.473(1). We now issue this opinion to explain how the material question of law was overlooked, and we address important issues of law presented by this original petition.

In this petition, we examine whether a statutorily recognized independent contractor relationship between a taxicab business and its driver, under NRS 706.473, prevents liability for the taxicab business sued under a respondeat superior theory of liability. In addressing this issue, we must first consider whether NRS 706.473(1), which authorizes the leasing of taxicabs to independent contractors in counties with populations of less than 400,000, applied to Washoe County on the date that the underlying motor vehicle incident is alleged to have occurred. To answer this question, we take the opportunity to highlight the application of NRS 0.050, which defines the term "population," as used in various Nevada Revised Statutes when another meaning for that term is not expressly provided in the statute or otherwise required by the statute's context. Because NRS 706.473 does not define population or the date for determining the population of a given county, NRS 0.050 guides our analysis. We conclude that NRS 0.050 directs the application of the United States Census rather than any state-produced tables, and at the time of the underlying incident, the population in Washoe County for purposes of NRS 706.473 was less than 400,000 based on the 2000 United States Census.

The district court concluded

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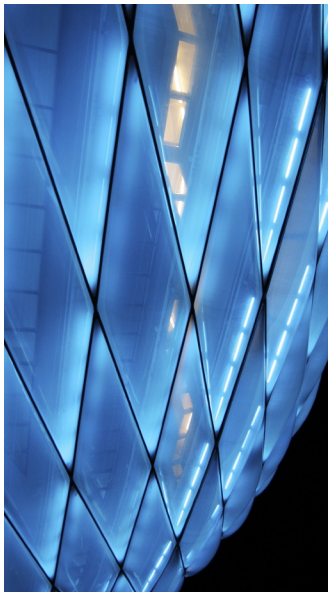

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that the nature of the relationship between the taxicab company and the cabdriver was a question of fact for the jury, without addressing NRS 706.473's potentially dispositive application. While we decline here to depart from this court's general policy of not considering writ petitions challenging the denial of summary judgment, and therefore do not order the district court to vacate its denial of summary judgment, we nevertheless note that the district court may wish to reconsider its reasoning for denying summary judgment in light of the analysis set forth below.

Gallegos v. Malco Enters. of Nevada, 127 Nev. Adv. Op. No. 51 (August 4, 2011) In this opinion, we clarify that rights of action held by a judgment debtor are subject to execution toward satisfaction of a judgment under NRS 21.080, and may be judicially assigned pursuant to NRS 21.320. Because, in this case, appellant Pedro Gallegos properly asserted a right of action assigned to him by another district court, we conclude that the district court in the instant action erred in determining that he lacked standing to bring the claim and in granting summary judgment to respondents on that basis. Accordingly, we reverse the district court's summary judgment and remand this matter for further proceedings.

Hawkins v. State, 127 Nev. Adv. Op. No. 50 (August 4, 2011) Appellant Collie Hawkins contends that the district court erred by rejecting his challenges to the State's peremptory challenges of three jurors as impermissible race discrimination under Batson v. Kentucky, 476 U.S. 79 (1986). On the record and briefs presented, we cannot sustain this claim.

The defense objected to the State's peremptory challenges, citing Batson. The State responded with ostensibly race-neutral explanations for its juror strikes. In particular, the State justified removing a Middle-Eastern computer science professor from the jury because "professors are notoriously liberal," further clarifying, "I just don't like them on my juries, period." The defense did not challenge the State's explanations as pretextual or the district court's acceptance of them as illegitimate.

Rennels v. Rennels, 127 Nev. Adv. Op. No. 49 (August 4, 2011) Grandparents and other nonparents are typically not entitled to visitation with a minor child as a matter of right because there is a recognized presumption that a parent's desire to deny visitation is in the best interest of the child. However, pursuant to NRS 125C.050, a grandparent or other nonparent may be granted judicially approved visitation rights in some instances. The first issue presented in this appeal is whether the stipulated visitation order between a parent and a grandmother was a final decree entitled to res judicata protections. We conclude that it was, so we must next examine whether the parental presumption continues to apply when a parent seeks to modify or terminate a nonparent's judicially approved visitation rights with a minor child. We conclude that the parental presumption applies at the time of the court's initial determination of a nonparent's visitation rights. However, when, as in this case, a parent seeks to modify or terminate the judicially approved visitation rights of a nonparent, the parental presumption is no longer controlling.

In so concluding, we adopt the two-prong test enunciated in Ellis v. Carucci, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007), in circumstances where a party seeks to modify or terminate a nonparent's judicially approved visitation rights with a minor child, and we now hold that modification or termination of a nonparent's judicially approved visitation rights is only war-

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ranted upon a showing of a substantial change in circumstances that affects a child's welfare such that it is in the child's best interest to modify the existing visitation arrangement. Id. Applying the test to this case, we conclude that the district court failed to articulate any substantial change in circumstances before it terminated appellant's nonparent visitation rights with her granddaughter and, therefore, it is not in the best interests of the child to terminate visitation. Thus, we reverse.

Roethlisberger v. McNulty, 127 Nev. Adv. Op. No. 48 (August 4, 2011) Appellant moved for a change of venue pursuant to NRS 13.040, based on residence, and NRS 13.050, based on convenience. When his motion was denied, he filed this appeal, arguing that none of the defendants reside in the county where the action is to be tried and that because the alleged events occurred in a different county, venue should be transferred there for reasons of convenience and justice. We conclude, however, that as venue was not improper as to appellant, he lacked standing to challenge venue based on his codefendant's place of residence. Also, as to the discretionary venue provision concerning convenience and the ends of justice, we conclude that the district court did not abuse its wide discretion in refusing to change the place of trial. Accordingly, we affirm the district court's order.

Las Vegas Metro. Police Dep't v. Coregis Ins. Co., 127 Nev. Adv. Op. No. 47 (August 4, 2011)
These appeals raise important issues about insurance claim notice provisions and whether an insurer may properly deny coverage to an insured based on late notice of a claim in the absence of prejudice to the insurer. Because we conclude that prejudice must be shown, we also address the issue of who has the burden to demonstrate prejudice or lack of prejudice and place that burden on the insurer. Before reaching those issues, however, we first address whether summary judgment was appropriately entered in favor of the insurer, when the parties dispute whether the notice was timely, given the language of the insurance policy and the facts present here.

Appellant Las Vegas Metropolitan Police Department (LVMPD) was named as a defendant in a federal district court action alleging civil rights violations. LVMPD had an insurance policy with respondent Coregis Insurance Company to protect against liability for police officer actions when the damages exceeded a certain amount. Coregis denied LVMPD coverage for the civil rights claims because LVMPD did not notify Coregis of LVMPD's potential liability until ten years after the incident that led to the civil rights lawsuit. LVMPD settled the civil rights action, incurring fees and costs in defending the case. LVMPD then filed a declaratory-judgment action seeking a judicial determination that Coregis was required to defend and indemnify LVMPD for damages related to the civil rights claims. On Coregis's motion, the district court entered summary judgment in favor of Coregis, concluding that LVMPD's notice was clearly late and that Coregis was prejudiced by the late notice.

Viewing the evidence in a light most favorable to LVMPD, we conclude that there were genuine issues of material fact regarding the timeliness of LVMPD's notice, such that summary judgment was not appropriate here. With regard to the issues concerning denial of coverage based on failure to comply with notice requirements, after considering the parties' arguments and persuasive caselaw, we conclude that when an insurer denies

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coverage of a claim because the insured party failed to provide timely notice of the claim, the insurer must demonstrate that notice was late and that it was prejudiced by the late notice in order to assert a late-notice defense to coverage. Accordingly, we reverse the summary judgment and remand this case for proceedings consistent with this opinion.

City of Oakland v. Desert Outdoor Adver., 127 Nev. Adv. Op. No. 46 (August 4, 2011) This appeal involves an attempt by appellant City of Oakland to enforce, in Nevada, a California civil judgment against respondent Desert Outdoor Advertising, Inc. We consider whether the California judgment is entitled to full faith and credit in Nevada. Recognizing that Huntington v. Attrill, 146 U.S. 657 (1892), provides an exemption to the Full Faith and Credit Clause of the United States Constitution, such that other states' penal judgments are unenforceable in the State of Nevada, we conclude that the California judgment in this case was penal in nature and, as such, is not enforceable in Nevada. Accordingly, we affirm the district court's decision in this matter.

Williams v. Eighth Judicial Dist. Court, 127 Nev. Adv. Op. No. 45 (July 28, 2011) These consolidated writ petitions raise two novel issues involving the admissibility of expert testimony: (1) whether a nurse can testify as an expert regarding medical causation, and (2) whether defense expert testimony offering alternative causation theories must meet the "reasonable degree of medical probability" standard set forth in Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. 153, 155, 111 P.3d 1112, 1114 (2005). We conclude that a nurse can testify regarding matters within his or her specialized area of practice, but not as to medical causation unless he or she has obtained the requisite knowledge, skill, experience, or training to identify cause. We further take this opportunity to clarify the standard for defense expert testimony regarding medical causation and conclude that the standard differs depending on how the defendant utilizes the expert's testimony. When a defense expert traverses the causation theory offered by the plaintiff and purports to establish an independent causation theory, the testimony must be stated to a reasonable degree of medical probability pursuant to Morsicato. However, when a defense expert's testimony of alternative causation theories controverts an element of the plaintiff's prima facie case where the plaintiff bears the burden of proof, the testimony need not be stated to a reasonable degree of medical probability, but it must be relevant and supported by competent medical research.

Cortes v. State, 127 Nev. Adv. Op. No. 44 (July 21, 2011) During a routine traffic stop, the police developed what the district court found was a reasonable suspicion that the car's passenger, appellant Arturo Torres Cortes, was armed and dangerous. The police ordered Cortes out of the car and subjected him to a patdown search, which produced the evidence underlying the conviction for possession of a controlled substance (methamphetamine) he now appeals. Under Arizona v. Johnson, 555 U.S. ___, 129 S. Ct. 781 (2009), if the finding of reasonable suspicion is sound, no Fourth Amendment violation occurred. On appeal, Cortes urges us to reject the district court's finding of reasonable suspicion or to interpret the Nevada constitutional guarantee against unreasonable searches and seizures more strictly than the Supreme Court interpreted the Fourth Amendment in Johnson. Finding no basis for doing so, we affirm.

Rose v. State, 127 Nev. Adv. Op. No. 43 (July

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21, 2011) In this appeal, we address whether a charge of assault with a deadly weapon merges with a charged homicide so that it cannot be used as the basis for second-degree felony murder. To maintain the narrow confines of second-degree felony murder, wherein the felonies that can be used to support a conviction are not statutorily enumerated and the use of the felony-murder rule has "the potential for untoward prosecutions," Sheriff v. Morris, 99 Nev. 109, 118, 659 P.2d 852, 859 (1983), we hold that assaultive-type felonies that involve a threat of immediate violent injury merge with a charged homicide for purposes of second-degree felony murder and therefore cannot be used as the basis for a second-degree felony-murder conviction. Whether the felony is assaultive must be determined by the jury based on the manner in which the felony was committed. Because the crime at issue here, assault with a deadly weapon, could be assaultive based on the manner in which it was committed, we conclude that the district court erred when it failed to instruct the jury to determine whether the felony underlying the second-degree felony-murder theory was assaultive based on the manner in which the felony was committed. We further conclude that the error was not harmless beyond a reasonable doubt. Accordingly, we reverse the judgment of conviction and remand this case for further proceedings consistent with this opinion.

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Winkle v. Warden, 127 Nev. Adv. Op. No. 42 (July 14, 2011) Petitioner Jessica Lynn Winkle seeks a writ of mandamus directing respondents Sheryl Foster, Warden of the Jean Conservation Camp, and Howard Skolnik, Director of the Nevada Department of Corrections, to release her to the "305 Program"[2] for alcohol treatment and residential confinement pursuant to NRS 209.425 through NRS 209.429.

In 2009, Winkle pleaded guilty to causing the death of another by driving under the influence of alcohol, in violation of NRS 484.3795 (currently codified as NRS 484C.430). Winkle was sentenced to two to five years in state prison; however, before the expiration of her minimum term, Winkle was released to the 305 Program for alcohol treatment and residential confinement. Several months later, the local paper ran a series of articles reporting that law enforcement and the courts were failing to enforce the DUI laws—in particular, by improperly releasing several felony DUI offenders to residential confinement before completion of their minimum two-year sentences. In response to the articles, Skolnik determined that 8 of the 40 offenders mentioned, including Winkle, were still in residential confinement and had not served the minimum two-year term. As a result, Skolnik directed that Winkle be rearrested and returned to incarceration. Winkle's mandamus petition followed.

In her petition, Winkle seeks a writ of mandamus directing respondents to release her to the 305 Program. We are persuaded that writ relief is warranted for two reasons. First, we conclude that the express language of NRS 209.427 and NRS 209.429 mandates release of qualified offenders to the program for alcohol treatment and residential confinement. Second, we conclude that, unlike in State v. District Court (Jackson), 121 Nev. 413, 116 P.3d 834 (2005), the express language of NRS 209.429(4)(a) deems an assignment to the program as "imprisonment" for purposes of NRS 484C.430 and "not a release on parole." We therefore grant the petition for a writ of mandamus. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

Dynalectric Co. v. Clark & Sullivan, 127 Nev. *Dynalectric Co. v. Clark & Sullivan*, 127 Nev. Adv. Op. No. 41 (July 14, 2011) In this appeal, we address the measure of damages applicable to promissory estoppel claims. We adopt a flexible approach as suggested in the Restatement (Second) of Contracts and apply the same factors that bear on promissory estoppel relief to the remedy afforded by the breach. The determination of the appropriate measure of damages in any given case turns on considerations of what justice requires and the foreseeability and certainty of the particular damages award sought. We further conclude that the presumptive measure of damages for a general contractor that reasonably relies upon a subcontractor's unfulfilled promise is the difference between the nonperforming subcontractor's original bid and the cost of the replacement subcontractor's performance.

Leyva v. National Default Servicing Corp., 127 Nev. Adv. Op. No. 40 (July 7, 2011) In this appeal, we consider issues arising out of Nevada's Foreclosure Mediation Program. First, we must determine whether a homeowner who is not the original mortgagor is a proper party to participate in the program. We conclude that the Foreclosure Mediation statute, NRS 107.086, and the Foreclosure Mediation Rules (FMRs) dictate that a homeowner, even if he or she is not the named mortgagor, is a proper party entitled to request mediation fol-

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lowing a notice of default.

Second, we must determine if a party is considered to have complied with the applicable statute and FMRs governing document production in a mediation proceeding by producing what the district court referred to as "essential documents." In this, we address whether substantial compliance satisfies the mandates of the statute and FMRs. Because we conclude that strict compliance is compelled by NRS 107.086(4) and (5), that the assignment offered was defective, and that no endorsement of the mortgage note was provided according to Article 3 of the Uniform Commercial Code, we conclude that Wells Fargo failed to produce the documents required under NRS 107.086(4). Additionally, we recently concluded in Pasillas v. HSBC Bank USA, 127 Nev. ___, ___ P.3d ___ (Adv. Op. No. 39, July 7, 2011), that a party's failure to produce the enumerated documents required by NRS 107.086 and the FMRs prohibits the district court from directing the program administrator to certify the mediation so that the foreclosure process can proceed. Here, we again conclude that, due to the statute's and the FMRs' mandatory language regarding document production, a party is considered to have fully complied with the statute and rules only upon production of all documents required. Failure to do so is a sanctionable offense, and the district court is prohibited from allowing the foreclosure process to proceed. Therefore, we must reverse and remand this case to the district court for it to determine appropriate sanctions against respondents.[

Pasillas v. HSBC Bank USA, 127 Nev. Adv. Op. No. 39 (July 7, 2011) this appeal, we consider issues arising out of Nevada's Foreclosure Mediation Program and address whether a lender commits sanctionable offenses when it does not produce documents and does not have someone present at the mediation with the authority to modify the loan, as set forth in the applicable statute, NRS 107.086, and the Foreclosure Mediation Rules (FMRs).

Because NRS 107.086 and the FMRs expressly require that certain documents be produced during foreclosure mediation and that someone with authority to modify the loan must be present or accessible during the mediation, we conclude that a party's failure to comply with these requirements is an offense subject to sanctions by the district court. In such an event, the district court shall not direct the program administrator to certify the mediation to allow the foreclosure process to proceed until the parties have fully complied with the statute and rules governing foreclosure mediation.

Here, because respondents HSBC Bank USA, Power Default Services, and American Home Mortgage Servicing, Inc. (AHMSI), did not bring the required documents to the mediation and did not have access to someone authorized to modify the loan during the mediation, we conclude that the district court erred in denying appellants Emiliano and Yvette Pasillas's petition for judicial review. Therefore, we reverse the district court's order and remand this matter to the district court so that the court may determine sanctions.

Redrock Valley Ranch v. Washoe County, 127 Nev. Adv. Op. No. 38 (July 7, 2011) Redrock Valley Ranch, LLC (RVR) proposes to export water from one hydrographic basin to another in northern Nevada. Both basins lie in Washoe County. The State Engineer approved the transfer applications, but Washoe County declined to grant RVR a special use permit for the pipe-

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lines, pump houses, and other infrastructure needed to make the water exportation plan a reality. The district court upheld the denial of the special use permit, and RVR appeals.

Washoe County gave mixed signals concerning the project. RVR contends that the inconsistent positions taken by Washoe County, together with the State Engineer's approval of the transfer applications, required Washoe County to grant RVR's special use permit application. We disagree and affirm.

Smith v. Kisorin USA, 127 Nev. Adv. Op. No. 37 (July 7, 2011) In this appeal, we consider whether a corporation is required to deliver a dissenters' rights notice to all stockholders, irrespective of whether the stockholders hold the stock in street name or are beneficial stockholders. We conclude that a construction of the applicable statutes that would require notice to both street name and beneficial stockholders would place unfeasible requirements on corporations. Due to the impracticality of delivering notice to beneficial owners, we conclude that Nevada corporations are required to send dissenters' notices only to record stockholders, including those holding the stock in street name.

Costello v. Casler, 127 Nev. Adv. Op. No. 36 (July 7, 2011) In this appeal, we consider whether, under Nevada Rule of Civil Procedure (NRCP) 15(c), an amendment to a complaint adding a decedent's estate as a party to an action will relate back to the date of the original pleading filed prior to the expiration of the statute of limitations that named only the decedent as a party. In particular, we address whether a decedent's insurer's notice and knowledge of the institution of an action may be imputed to the decedent's estate for purposes of satisfying the relation back requirements of NRCP 15(c). We answer both of these questions in the affirmative and therefore conclude that the district court erred in denying appellant Debbie Costello leave to amend her complaint to add respondent Philip Casler's estate as a defendant. We therefore reverse the judgment of the district court and remand this case for proceedings consistent with this opinion.

Jitnan v. Oliver, 127 Nev. Adv. Op. No. 35 (July 7, 2011) In these consolidated appeals, we address whether the district court abused its discretion in denying a challenge for cause to a prospective juror. We conclude that it did. We hold that when a prospective juror expresses a potentially disqualifying opinion or bias and is inconsistent in his or her responses regarding that preconception upon further inquiry, the district court must set forth, on the record, the reasons for its grant or denial of the challenge for cause. We conclude that the district court erred in failing to do so. We nonetheless affirm the judgment of the district court because the case was ultimately tried by a fair and impartial jury.

Saletta v. State, 127 Nev. Adv. Op. No. 34 (July 7, 2011) In this appeal, we consider whether the district court, in conducting a jury poll after a jury has published its verdict, may continue to poll the jury after a juror has retreated from the published verdict and whether the district court may question a dissenting juror regarding his or her reasons for retreating from the verdict. We hold that NRS 175.531 allows the district court some discretion in its polling method, the district court's polling method is reviewed for an abuse of discretion, and it will constitute reversible error if the totality of the circumstances indicate that the polling method was coercive. To this end, we

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adopt the three factors that the Second Circuit Court of Appeals identified in U.S. v. Gambino, 951 F.2d 498, 501-02 (2d Cir. 1991), for evaluating the coerciveness of a polling method: (1) whether counsel objected to the polling, (2) whether the district court gave a cautionary instruction to the jury before excusing the jury for further deliberation, and (3) the amount of time that it took the jury to reach a verdict after deliberation resumed. We further hold that NRS 175.531 limits the district court's options for addressing a non-unanimous jury poll and prohibits the district court from questioning jurors regarding their reasons for retreating from the verdict. We conclude that although the district court's polling method was not coercive and the district court did not abuse its discretion by continuing to poll the jury after a juror retreated from the verdict, the district court erred by questioning the dissenting juror, the error was plain, and it affected appellant David Saletta's substantial rights. Accordingly, we reverse the judgment of conviction and remand for further proceedings.

Benchmark Insurance Co. v. Sparks, 127 Nev. Adv. Op. No. 33 (July 7, 2011) In this appeal, we consider whether an automobile liability insurer effectively limited its duty to defend its policyholder in a tort lawsuit brought against the policyholder. Specifically, we are asked to decide whether a provision in Benchmark Insurance Company's standard-form insurance policy unambiguously alerted the policyholder, Robert Sparks, that Benchmark could terminate its duty to defend him by depositing the policy's liability limits with the district court. Concluding that the policy provision at issue is ambiguous, we construe it in accordance with the reasonable expectations of the policyholder. Because a policyholder in Sparks' position would reasonably expect his insurer to procure a settlement on his behalf or defend him until the policy limits have been used to satisfy a judgment entered against him, we affirm the district court's order in which it denied Benchmark's motion for summary judgment.

Lawrence v. Clark County, 127 Nev. Adv. Op. No. 32 (July 7, 2011) This appeal concerns whether state-owned land that was once submerged under a waterway can be freely transferred to respondent Clark County, or whether the public trust doctrine prohibits such a transfer. Generally, under the public trust doctrine, a state holds the banks and beds of navigable waterways in trust for the public and subject to restraints on alienability. Although the public trust doctrine has never expressly been adopted in Nevada, this court has previously applied some of its tenets and its existence is implicit in Nevada law.

Thus, in this opinion, we clarify Nevada's public trust doctrine jurisprudence by expressly adopting the doctrine and determining its application in Nevada, given the public's interest in Nevada's waters and the law's acknowledgment of that interest. In so doing, after setting forth the facts and procedural history, we will discuss the development of the public trust doctrine in general, and then its development in Nevada specifically. Next, we will set forth Nevada's public trust doctrine framework, under which we conclude that whether the formerly submerged land is alienable, such that it can be transferred to Clark County, turns on the unanswered questions of whether the stretch of water that once covered the land was navigable at the time of Nevada's statehood, whether the land became dry by reliction or by avulsion, and whether transferring the land contravenes the public trust. We thus reverse the district court

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judgment underlying this appeal, which determined that the disputed land is transferable to Clark County, and we remand this matter for determinations as to whether the disputed land was submerged beneath navigable waters at the time of Nevada's statehood, how it became dry land, and, if necessary, whether its transfer accords with the public's interest in it.

State, Tax Comm'n v. American Home Shield, 127 Nev. Adv. Op. No. 31 (July 7, 2011) We first address whether NRS 680B.120 applies to AHS's refund request. Because we determine that NRS 680B.120 applies to any and all overpayments of insurance premium taxes, regardless of whether they were made in error or on exempt services, we conclude that the Department did not legally err or abuse its discretion when it determined that AHS's refund requests for taxes paid in 2003 and 2004 were barred by NRS 680B.120's one-year limitation period. We also conclude that the district court's reliance on Humboldt County in determining that AHS was entitled to a refund of all of its erroneous tax payments was misplaced. Finally, because NRS 680B.120 is the applicable statute governing AHS's refund request and it does not provide for interest, we hold that the district court erred by determining that AHS was entitled to interest on its refunds. Accordingly, we reverse the district court's order granting the petition for judicial review.

Berrum v. Otto, 127 Nev. Adv. Op. No. 30(July 7, 2011) This appeal arises out of an ongoing conflict between Washoe County and taxpayers in Incline Village and Crystal Bay regarding

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property tax valuation, equalization, and collection.[2] In this appeal, we must determine whether the district court properly issued a writ of mandamus requiring the Washoe County Treasurer to refund excess taxes paid by the respondent Taxpayers for the 2006-2007 tax year. The Taxpayers paid the excess taxes because of a stay imposed in a pending appeal challenging a prior year's assessments. We conclude that the district court properly issued the writ of mandamus because the Taxpayers paid more than was due and typical administrative remedies to recover overpaid taxes do not apply where the Taxpayers were successful at all levels below. Additionally, the Treasurer had a duty to refund the excess taxes pursuant to NRS 360.2935.

Arguello v. Sunset Station, Inc., 127 Nev. Adv. Op. No. 29 (June 2, 2011) In this appeal, we primarily consider the scope of NRS 651.010(1), which limits the liability of hotels for "the theft, loss, damage or destruction of any property brought by a patron upon the premises or left in a motor vehicle upon the premises . . . in the absence of gross neglect by the owner or keeper" of the hotel. In particular, we consider whether NRS 651.010(1) shields a hotel from liability arising out of the theft of and damage to a guest's motor vehicle that was parked in the hotel's valet parking lot. We conclude that it does not.

Lund v. Eighth Judicial Dist. Court, 127 Nev. Adv. Op. No. 28 (June 2, 2011) In this petition, we address the narrow issue of whether a defendant may, under NRCP 13(h), bring a counterclaim that adds new parties to an action. Under that rule, if there is at least one original party included in the counterclaim, a defendant may add new parties to the action through a counterclaim as long as the nonparty meets the joinder requirements under NRCP 19 or 20. We take this opportunity to address this discrete issue and, while the dispute presented in this original proceeding does not warrant this court's expedited or emergency review, we nonetheless grant in part the petition for a writ of mandamus and direct the district court to vacate its order dismissing the counterclaims and to reconsider the decision in light of this opinion. Because petitioner has failed to fully develop his petition for extraordinary relief by necessarily addressing NRCP 19 or NRCP 20, however, we reject petitioner's request that we order the dismissed counterclaims reinstated.

Want to recover your fees for meritless civil rights litigation? The Supreme Court explains how

Baker Donelson Bearman Caldwell & Berkowitz PC

The U.S. Supreme Court ruled earlier this week that in civil rights cases where the plaintiff brings both frivolous and nonfrivolous claims, the defendant can recover those attorneys' fees it would not have incurred but for the frivolous claims.

In , the high court unanimously held that Section 1988 of the Civil Rights Attorney's Fees Awards Act of 1976 allows a defendant to recover reasonable attorneys' fees incurred because of a frivolous claim. While this ruling does not lighten the burden on successful defendants to show that such claims are "frivolous, unreasonable, or without foundation" in order to recoup their fees, it does open the way for defendants to recover at least some of their fees even where the plaintiff's suit also involved non-frivolous claims. Previously, the Sixth Cir-

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cuit Court of Appeals had held that defendants could only recover their attorneys' fees where all of the plaintiff's claims were found meritless. By contrast, the Fifth Circuit Court of Appeals had ruled that defendants could recover all of their attorneys' fees even where only one of the plaintiff's claims lacked foundation.

In this case, the plaintiff, Fox, was a candidate for the position of police chief. He alleged that the incumbent, Vice, engaged in dirty tricks intended to drive him out of the race. After Fox was elected police chief and Vice was convicted of extortion in state court, Fox sued Vice and the town of Vinton in a Louisiana state court, alleging extortion, defamation, and intentional infliction of emotional distress, as well as violation of his federal constitutional rights. After Fox voluntarily dismissed his federal constitutional claim and the other claims were directed to state court, the federal court granted the defendants over $54,000 in attorneys' fees and costs under Section 1988, reasoning they were entitled to recover for defending against Fox's "frivolous" federal claim. The district court did not separate out the amounts the defendants spent on the nonfrivolous state law claims but rather granted the defendants all their fees.

In a 2-1 decision, the Fifth Circuit affirmed that Fox's federal claim was "frivolous" and that the defendants could recover all their attorneys' fees from Fox "without segregating fees for the supposedly frivolous and non-frivolous claims." The Supreme Court rejected this more lax standard, as well as the more stringent Sixth Circuit position. Instead, it ruled that Section 1988 allows a defendant to recover reasonable attorneys' fees "incurred because of, but only because of, frivolous claims."

This new standard will allow compensation for attorneys' work relating to both frivolous and non-frivolous claims in some instances, such as when only the frivolous allegation exposes the defendant to damages, or when the frivolous claim forces the case into a different judicial forum, or if the defendant can prove the frivolous claim forced him to hire more expensive counsel.

Daugherty v. City of Covina, No. 09-56395 (August 16, 2011) Under the totality of the circumstances, a search warrant issued to search a suspect's home computer and electronic equipment lacks probable cause when (1) no evidence of possession or attempt to possess child pornography was submit ted to the issuing magistrate; (2) no evidence was submitted to the magistrate regarding computer or electronics use by the suspect; and (3) the only evidence linking the suspect's attempted child molestation to possession of child pornography is the experience of the requesting police officer, with no further explanation. Our circuit, however, has not previously addressed this question. Therefore, the officers involved in the search are entitled to qualified immunity.

In Defense of Animals v. United States Dept.of Interior, No. 10-16715 (August 15, 2011) This interlocutory appeal arises from an action instituted in the district court to stop the government from rounding up, destroying, and auctioning off wild horses and burros in the Twin Peaks Herd Management Area on the California-Nevada border. Plaintiffs allege that the government's actions will violate the Wild Free-Roaming Horses and Burros Act ("Wild Horses Act"), 16 U.S.C. § 1331 et seq., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.

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Association for Las Angeles Deputy Sheriffs, No. 08-56283 (August 10, 2011) This appeal concerns the requirements of due process when law enforcement officers charged with felonies are suspended without pay. We affirm in part and reverse in part the decision of the district court. Plaintiffs have adequately alleged that Defendants' policies caused violations of their constitutional rights, and therefore Plaintiffs have stated *Monell* claims against the County. All individual defendants, however, are entitled to qualified immunity from the claims of Debs and O'Donoghue, whose right to a more substantial post-suspension hearing was not clearly established at the time of the violations. The individually named Civil Service Commissioners are also entitled to qualified immunity from Wilkinson's and Sherr's claims because the Commission was stripped of jurisdiction by the California Court of Appeal in *Zuniga*. But those claims may go forward against the Sheriff and the County Supervisors, who were constitutionally required to provide post-suspension procedures for suspended deputy sheriffs who later retired. We remand for further proceedings consistent with this opinion.

Walls v. Central Costra County Transit Auth., No. 10-15967 (August 6, 2011) Plaintiff-Appellant Kerry Walls ("Walls") appeals the district court's grant of summary judgment in favor of Defendant-Appellee Central Contra Costa Transit Authority ("CCCTA"). Walls is a former bus driver for CCCTA. After being terminated on January 27, 2006, Walls was reinstated on March 2, 2006 pursuant to an agreement executed over the course of a grievance process between Walls, his union representative, and CCCTA ("Last Chance Agreement" or "Agreement").

On March 3, 2006, Walls incurred an unexcused absence that violated the attendance requirements of the Agreement. As a result, CCCTA again terminated Walls on March 6, 2006. After grieving his termination, Walls brought this suit, claiming that his March 6 discharge violated the Family Medical Leave Act ("FMLA") and his due process right to a pretermination hearing under the United States and California Constitutions. The parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of CCCTA on both claims, reasoning that Walls was not an employee eligible for FMLA benefits when he requested leave, and that he had waived his due process rights. Walls timely appealed. Additional facts are noted where relevant. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and reverse and remand in part.

Alpha Delta-Chi-Delta Chapter v. Reed, No. 09-55299 (August 2, 2011) The Supreme Court held in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez* that a public law school does not violate the Constitution when it "condition[s] its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students." 130 S. Ct. 2971, 2978 (2010). The Court referred to the open membership requirement as an "all-comers policy" and concluded that such a policy was a "reasonable, viewpoint-neutral condition on access to the student-organization forum." *Id.* The Court further held that the all-comers policy did not violate the Free Exercise Clause of the First Amendment. *Id.* at 2995 n.27. The Court expressly declined to address whether these holdings would extend to a narrower nondiscrimina-

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tion policy that, instead of prohibiting *all* membership restrictions, prohibited membership restrictions only on certain specified bases, for example, race, gender, religion, and sexual orientation. *See id.* at 2982, 2984. The constitutionality of such a policy is the issue before us in this case.

We conclude that the narrower policy is constitutional. We hold, however, that Plaintiffs have raised a triable issue of fact as to whether the narrower policy was selectively enforced in this particular case, thereby violating Plaintiffs' rights under the First and Fourteenth Amendments. We affirm in part and reverse in part, and remand to the district court for further proceedings.

Hoye v. City of Oakland, No. 09-16753 (July 28, 2011) Throughout our nation's history, Americans have counted on the First Amendment to protect their right to ask their fellow citizens to change their mind. Abolitionists, suffragists, socialists, pacifists, union members, war protestors, religious believers, civil rights campaigners, anti-tax activists, and countless others have appealed to the principle, enshrined within the First Amendment, that in a democracy such as ours, public debate must be robust and free and that, for it to be so, the Constitution's protection of the freedom of speech must extend to the sidewalk encounter of the proselytizer and his prospective convert. These instances of public persuasion constitute the lifeblood of a self-governing people's liberty, and so even when the beliefs propagated seem to some the "rankest error" that "naturally would offend" any listener, our founding charter deems such encounters "in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1940). This case calls on us to apply that principle.

Walter Hoye, a minister, is a so-called "sidewalk counselor." He regularly stands outside a reproductive health clinic in the City of Oakland, seeking to engage women in what he calls a "friendly conversation" to dissuade them from having an abortion.

Concerned about disruptive anti-abortion protests outside clinics, the Oakland City Council enacted a so-called bubble ordinance (the "Ordinance"), its name derived from the 100-foot metaphorical "bubble" the Ordinance creates around the entrances to reproductive health clinics. Within such zones, the Ordinance makes it an offense knowingly and willfully to approach within eight feet of an individual seeking entry to the clinic if one's purpose in approaching that person is to engage in conversation, protest, counseling, or various other forms of speech. The Ordinance is largely modeled after the Colorado statute held constitutional in *Hill v. Colorado*, 530 U.S. 703 (2000).

Hoye was convicted of two separate violations of the Ordinance. (His convictions were reversed on procedural grounds during the pendency of this appeal.) He now challenges the Ordinance in this § 1983 action, contending that the Ordinance infringes upon the freedom of speech guaranteed by the First Amendment to the United States Constitution. Hoye also argues that the Ordinance violates the federal constitution's Due Process Clause, as well as the state and federal guarantees of equal protection of the laws. A theme central to his challenges is his contention that Oakland does not enforce the Ordinance evenhandedly, as it has a policy of not enforcing the Ordinance against volunteers who engage in pro-abortion speech outside reproductive health clinics. The District Court

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granted Oakland's motion for summary judgment on all of Hoye's claims, and Hoye appealed. We now affirm in part, reverse in part, and remand for the determination of appropriate relief.

First, the Ordinance is facially constitutional. That is to say, we do not find any relevant differences between the Ordinance's purpose and text and those of the Colorado statute that the Supreme Court held to be constitutional in *Hill*.

Second, as to Hoye's challenge to the enforcement of the Ordinance, we hold that Oakland's enforcement policy is a constitutionally invalid, content-based regulation of speech. By adopting that policy, Oakland has taken sides in a public debate in a manner that, as *Hill* itself explained, the Constitution does not permit. But because this problem is not a problem with the Ordinance itself, we remand this case to the District Court to craft a remedy that ensures that Oakland will adopt and henceforth apply a policy that enforces the Ordinance as written, that is, in an even-handed, constitutional manner.

Third, as to Hoye's challenge to whether Oakland may apply the Ordinance to situations in which doing so would prevent him from communicating his message, we conclude that the success of the challenge depends on Oakland's future enforcement policy and the particular circumstances in which that policy may be applied. We therefore do not reach that challenge but also do not preclude Hoye from bringing such a challenge in the future.

Estate of Amaro v. City of Oakland, No. 10-16152 (July 28, 2001) This interlocutory appeal requires us to resolve only the following question certified by the district court: whether the doctrine of equitable estoppel should apply where a plaintiff believes she has a 42 U.S.C. § 1983 claim but is dissuaded from bringing the claim by affirmative misrepresentations and stonewalling by the police. We hold that the equitable doctrine *does* apply in such a context and affirm the district court's holding on that legal question.

Fisher v. Tuscon Unified School Dist., No. 10-15124 (July 19, 2011) In 1974, African American and Mexican American students sued the Tucson, Arizona, school system, alleging intentional segregation and unconstitutional discrimination on the basis of race and national origin. For some 30 years after the parties settled in 1978, Tucson's schools operated subject to a federally enforced desegregation decree. In a careful review of the progress under the decree, the district court concluded that the school district had failed to act in good faith compliance with its desegregation obligations, but nonetheless declared the Tucson school system "unitary" and terminated court jurisdiction. Because Supreme Court precedent requires continuing court supervision under these circumstances, we reverse and remand.

Centro Familiar v. City of Yuma, No. 09-15422 (July 12, 2011) We address the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA).

Centro Familiar Cristiano Buenas Nuevas, founded in 1998, is a Christian congregation of around 250 members, associated with the Arizona Southern Baptist Convention. The church sued for a declaratory judgment, injunction, and damages, when the City of Yuma prevented it from conducting church services in a building it had bought for that purpose. The parties agreed

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to consolidate the preliminary injunction hearing with trial on the merits, and stipulated to many of the facts. No facts are at issue on appeal. We describe the facts in accord with the trial judge's findings of fact. This is a sort of reverse urban blight case, with the twist that instead of bars and nightclubs being treated as blighting their more genteel environs, the church is treated as blighting the bar and nightclub district.

Because Yuma requires religious assemblies to obtain a conditional use permit, and does not require similarly situated secular membership assemblies to do the same, it violates RLUIPA's equal terms provision. Because it does, we need not reach Centro Familiar's argument that the ordinance violates the Free Exercise Clause.

Patel v. Kent School Dist., No. 10-35430 (July 11, 2011) A.H., a developmentally disabled high-school student, had several sexual encounters with another developmentally disabled student in a school bathroom. Her mother alleges these encounters were the result of the school's failure to properly supervise A.H. We must decide whether the mother, individually and on behalf of A.H., has a cognizable Fourteenth Amendment due process claim against A.H.'s special education teacher. The district court found she did not and granted summary judgment to the teacher. We agree and affirm.

The Fourteenth Amendment's Due Process Clause generally does not require government actors to protect individuals from third parties. As we hold below, neither of two exceptions to this general rule—the "special relationship" exception or the "state-created danger" exception—applies here. If A.H. and her mother have viable claims, those claims arise under state tort law, not the federal Constitution.

Nichols v. Dancer, No. 10-15359 (June 24, 2011)This case tests the bounds of a public employer's right to discharge or demote an employee for taking action on a matter of public concern. Under the balancing test in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 568 (1968), we have long given public employers significant discretion to discipline employees if their conduct disrupts the workplace. That discretion, however, has never been unfettered. An employer may not interfere with an employee's First Amendment rights unless there is evidence that the employee's actions have actually disrupted the workplace or are reasonably likely to do so in the future. Simply saying that there has been or will be disruption, without supporting evidence, is not enough. In the face of *Pickering*, the "because I said so" approach is insufficient to establish a reasonable prediction of disruption, let alone actual disruption.

Kathleen Nichols, a former employee of the Washoe County School District ("District"), was forced to take early retirement after attending a school board meeting at which her boss was fired. The District claimed it was concerned that her association with her former boss would create conflicts in the office. Viewing the record in the light most favorable to Nichols, however, it appears the triggering factor in the District's action was simply Nichols's decision to sit next to her boss at the public board meeting, without even speaking to him. Because the District produced no evidence that Nichols's association with her boss actually disrupted the office or her performance, or reasonably threatened to cause future disruption, the District has failed to show that its interests in workplace efficiency outweigh Nichols's First Amendment interests.

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Accordingly, we reverse the district court's grant of summary judgment in favor of the District.

Water Wheel Recreational Camp, Inc. v. LaRance, No. 09-17357 (June 10, 2010) A tribal court system exercised jurisdiction over a non-Indian closely held corporation and its non-Indian owner in an unlawful detainer action for breach of a lease of tribal lands and trespass. It entered judgment in favor of the tribe. We examine the extent of an Indian tribe's civil authority over non-Indians acting on tribal land within the reservation. We hold that under the circumstances presented here, where there are no sufficient competing state interests at play, *Nevada v. Hicks*, 533 U.S. 353, 359-60 (2001), the tribe has regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana v. United States*, 450 U.S. 544 (1981). Because regulatory jurisdiction exists, we also consider whether adjudicative jurisdiction exists. In light of Supreme Court precedent recognizing tribes' inherent civil authority over non-Indian conduct on tribal land and congressional interest in promoting tribal self-government, we conclude that it does. Finally, applying traditional personal jurisdiction principles, we hold that in this instance, the tribal court has personal jurisdiction over a non-Indian agent acting on tribal land.

Thalmeier v. City of San Diego, No. 10-55322 (June 9, 2011) The modern era of campaign finance reform began in 1972, following the infamous break-in at the Watergate hotel. Congress responded to the ensuing scandal by overhauling the Federal Election Campaign Act to impose new caps on political spending, as states and cities followed suit with laws of their own. The City of San Diego (the "City") enacted its Municipal Election Campaign Control Ordinance ("ECCO") in 1973.

Recent Supreme Court decisions, notably *Citizens United v. FEC*, 130 S. Ct. 876 (2010), have once again placed the constitutionality of campaign finance reform in flux, inspiring new challenges to election laws across the country. This is one such case. Plaintiffs mount a First Amendment challenge to San Diego's campaign finance laws. The district court considered the constitutionality of five provisions and generally upheld the City's pure contribution limits, but enjoined a provision that restricts both the fundraising and spending of independent political committees. The district court correctly recognized that even as the campaign finance reform landscape has shifted, nearly four decades after the Watergate break-in *Buckley*'s expenditure-contribution distinction continues to frame the constitutional analysis of campaign finance regulations. Because the district court properly applied the applicable preliminary injunction standard in the context of the presently discernible rules governing campaign finance restrictions, we affirm.

Supreme Court to Decide Landmark Fourth Amendment Data Case

On June 27, the Supreme Court granted certiorari in the case of United States v. Jones, a case that will have a far-reaching impact on the scope of data evidence in criminal trials. But beyond its narrower impact on criminal procedure, the Court's ruling will signal its attitude on key data and evidence issues. When the Court is called upon to answer key e-discovery questions it may turn to many of the same considerations.

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The pertinent facts associated with this case include the following: Police installed a GPS tracker on the vehicle of Antoine Jones, a suspected player in a drug-dealing conspiracy, without a valid search warrant. The tracker logged Jones's continuous movements over the course of a month. At trial, the government introduced the GPS evidence and Jones was convicted.
On appeal to the D.C. Circuit, Jones argued that the Fourth Amendment's prohibition on unreasonable search and seizure without a warrant based on probable cause barred the government from using the GPS evidence. Following the landmark case Katz v. United States, the Court has held the Fourth Amendment applies when an individual has a reasonable expectation of privacy, even in a public area (Katz was arrested based on the monitoring of a phone call made in a public phone booth). Jones contended he reasonably expected privacy from continuous government monitoring, even on public roads. The government relied on a line of Supreme Court cases holding that an individual's location on public roads is a public fact, and argued that Jones had no reasonable expectation of privacy claim when he was continually exposing his location to anyone who cared to follow him.

The appellate court sided with Jones and rejected the government's argument that the "public fact" doctrine of Knotts and Karo controlled, instead focusing on the unique nature of the facts disclosed in a prolonged and continuous GPS search. A human follower can only see so much when tracking a car on public roads because of inherent limitations. But the GPS device can monitor and record everything, thus creating a "mosaic" of facts, the significance of which is greater than the sum of its parts.

Essentially, the court held that a person has no reasonable privacy interest in a single trip to the gas station, or the doctor, or to rendezvous with a cohort. But single facts can add up to a mosaic of facts that are so revealing that an individual has a reasonable interest in keeping them private.

The U.S. Supreme Court has instructed the parties to prepare briefs discussing not only the search issue, but also whether warrantless installation of a GPS device constitutes a Fourth Amendment seizure. The Court will likely focus the seizure issue and the constitutional soundness of the D.C. Circuit's "mosaic theory."

But more importantly for e-discovery aficionados, the Court will face tough policy questions on emerging technology and data storage. A persistent theme in e-discovery is "old laws, new technology." No law is older or more fundamental than the Bill of Rights, and GPS tracking is one of the hottest new trends in law enforcement. This clash between new and old, which underlies many e-discovery rules, will play out in the highest court in the country.

The Court may well decide that new technology is so effective at tracking people that the old Fourth Amendment rules simply cannot apply. Such a practical approach may signal that the Court is willing to be equally pragmatic in ruling on e-discovery regimes and doctrines. A more rigid approach may suggest the opposite. However the Court decides, United States v. Jones should be an exciting case to watch for those who follow e-discovery trends.

Court Declares Private Portions of Facebook and MySpace Accounts to be "Fair Game"

Zimmerman v. Weis Markets, Inc., No. CV-09-1535 (C.P. Northumberland May 19, 2011).

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In this personal injury litigation, the defendant requested preservation and disclosure of the non-public portions of the plaintiff's Facebook and MySpace pages. Noting that recent photographs and comments on the public portions of the plaintiff's pages appeared to contradict claims of physical and emotional distress, the defendant argued it should have access to relevant information in areas designated as private. The plaintiff countered that allowing access to shielded information would violate his reasonable expectation of privacy. Rejecting the plaintiff's argument, the court noted that no privilege exists in Pennsylvania for non-public social website information and the "paramount ideal" of pursuing truth favors liberal discovery. Further, the court agreed with the rationale in McMillen v. Hummingbird Speedway Inc. and cited Romano v. Steelcase, Inc., which held that an individual who voluntarily posts pictures and information on social websites does so with the intention of sharing, and thus cannot later claim any expectation of privacy, especially because the privacy policies of Facebook and MySpace disclose that any information posted may become publicly available at the user's own risk. Finding a reasonable likelihood that additional relevant information existed on the non-public portions, the court ordered the plaintiff to provide all passwords and user names to the defendant, and preserve all existing information.

Court Declines To Impose Sanctions, Orders Party to Preserve E-mails Through "Journaling Process"

Gaalla v. Citizens Medical Ctr., 2011 WL 2115670 (S.D. Tex. May 27, 2011).

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In this discovery dispute, the plaintiffs sought sanctions, alleging the defendants failed to preserve backup tapes, take timely snapshots of relevant e-mail accounts and deleted e-mails. Citing Zubulake, the court noted that the duty to preserve generally does not extend to inaccessible backup tapes and declined to impose sanctions finding the plaintiffs failed to demonstrate any applicable exception to this general rule. Further, the plaintiffs failed to present evidence of bad faith, a prerequisite to severe sanctions in the Fifth Circuit. On the contrary, the court determined the defendants took reasonable preservation steps by issuing a timely litigation hold, taking multiple "snapshots" of relevant e-mail accounts and preserving available backup tapes. The court ordered the defendants to institute a "journaling process" to continue preserving all relevant e-mail accounts indefinitely in addition to the available backup tapes, which the plaintiffs' forensic expert was given access to search. Finally, the court ordered the parties to reach a preservation agreement going forward.

Plaintiff Corporation and Counsel Sanctioned for Discovery Misconduct

Play Visions, Inc. v. Dollar Tree Stores, Inc., No. C09-1769 MJP (W.D. Wash. June 8, 2011).
In this intellectual property litigation, the defendants sought discovery sanctions in response to the plaintiff's motion for voluntary dismissal, alleging a persistent pattern of discovery-related misconduct. In response to the defendants' production requests, the plaintiff initially pointed the defendants to 360 boxes of unsorted records. Even though the plaintiff certified that its production was complete, the plaintiff's counsel e-mailed multiple addendums to discovery, many times requiring the defendants to scramble to meet court deadlines or necessitating extensions. Although the plaintiff certified that none of its records existed in electronic form, it eventually turned over some of the demanded ESI, claiming the accessibility of the database was unknown because "no one bothered to ask" the company's IT consultant (plaintiff's counsel also put the CFO and CEO in charge of discovery responsibilities). Citing this litany of discovery mishaps, the court found sanctions appropriate and awarded the plaintiff over $137,000. Further, because the plaintiff's counsel did not abide by Fed.R.Civ.P. 26(g)(1), which requires lawyers to make a "reasonable inquiry" before certifying discovery responses, the court ordered him to share the burden of the sanctions.

Court Upholds Entire Victor Stanley E-Discovery Sanction of Over $1 Million

Victor Stanley, Inc. v. Creative Pipe, Inc., Case 8:06-cv-02662-MJG (D. Md. June 15, 2011).
In this ongoing intellectual property litigation, the court reviewed Magistrate Judge Grimm's order requiring the defendant to pay $1,049,850.04 in attorney fees and costs as a monetary sanction for its egregious spoliation. The defendant objected to the amount of the award on the grounds that it exceeded the standard set by the court because the cost tabulations included discovery conducted before the spoliation could affect the plaintiff. Rejecting the defendant's general objections that the sanctions included fees and costs completely unrelated to the spoliation, the court also noted that the defendant's bad behavior began before the first set of depositions and impacted the discovery process from that point forward, as Judge Grimm had previously concluded. Furthermore, the court found the plaintiff's counsel made a good faith effort to conservatively allocate the costs to the spoliation. Finding the recommended award was only for those fees and costs

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reasonably flowing from the defendants' spoliation, the court adopted Judge Grimm's order and directed the defendants to pay the $571,440.12 balance of the sanction within 30 days.

Court Calls for Civility and Sanctions Defendant for Abusing Privilege Claims

Baez-Eliza v. Instituto Psicoterapeutico de Puerto Rico, 2011 WL 2413051 (D. Puerto Rico June 16, 2011). In this suit under the Americans with Disabilities Act, the parties requested the court determine if attorney-client privilege applied to ten e-mails sent between employees in the defendant corporation. The court had previously sanctioned both parties $500 for extensive abuses that turned the discovery process "into an all-out war," which included the filing of over 25 motions and repeated orders by the court to cooperate. Despite the previous sanctions and court's insistence to resolve disputes amicably, the defendant continued to claim that all ten e-mails were protected because they disclosed the fact that the defendant was consulting with its attorney. The court found the defendant's position showed "an ill-advised stubbornness" and "a poor understanding of the privilege's reach." Though the court did determine that some of the defendant's documents were privileged, others simply mentioned legal matters or representation but were devoid of legal content. In line with its threat to sanction further discovery misdeeds, the court sanctioned the defendant $1,000 for failing its duty of candor to the court. In an extended conclusion, the court admonished both parties for showing "reprehensible gamesmanship" instead of civility, urging responsible practitioners to adopt the latter.

Judge Scheindlin Withdraws Landmark Metadata Opinion

Natl Day Laborer Org. Network v. United States Immigration and Customs Enforcement Agency, Case 1:10-cv-03488-SAS (S.D.N.Y. June 17, 2011). In this Freedom of Information Act (FOIA) litigation, U.S. District Judge Scheindlin withdrew her landmark opinion that declared certain metadata to be "intrinsic" to the electronic record. Noting the parties had resolved their production format dispute, Judge Scheindlin declared that the earlier opinion "was not based on a full and developed record," and that it would be prudent to withdraw the decision "[i]n the interests of justice." Further, Judge Scheindlin declared that the withdrawn opinion "shall have no precedential value in this lawsuit or in any other lawsuit."

Court Sanctions Government for Stonewalling Wrongful Conviction Litigation

Limone v. United States, 2011 WL 2489965 (D. Mass. June 20, 2011).
In this claim under the Federal Tort Claims Act, the plaintiffs sought attorney fees for the government's alleged bad faith discovery conduct after winning a substantial jury award at trial for their wrongful murder convictions – resulting in thirty years of undeserved prison time. Reviewing the government's discovery conduct, the court found that over 7,000 documents were redacted to an "incomprehensible" extent due to the government's claim that they contained information which could reveal the identities of confidential informants. The court found that during the government's two-year-long discovery stonewalling effort, the FBI had not allowed the government lawyers handling the case to see the unredacted versions of the documents in question. Citing this behavior as a direct contradiction of the reasonable inquiry requirement under Fed.R.Civ P. 26(g), the court found the

government's actions constituted bad faith. Finding the government's behavior warranted sanctions, the court scheduled a hearing to determine which costs were reasonably related to the bad faith conduct.

Court Chides Plaintiff for Not Reviewing Own Facebook Account for Responsive Information

Offenback v. L.M. Bowman, Inc., 2011 WL 2491371 (M.D. Pa. June 22, 2011).
In this personal injury case, the defendants requested an in camera review of the plaintiff's Facebook and MySpace accounts, arguing the plaintiff's claims of physical and psychological impairment made relevant any evidence that documented the plaintiff's social life, physical capabilities and emotional state of mind. To the extent that such information was relevant under Fed.R.Civ.P. 26, the plaintiff agreed that limited public information on his Facebook account was discoverable and provided the password to the court (the plaintiff claimed he could no longer access his MySpace account). Upon review, the court agreed to the relevance of a limited amount of photographs and postings that reflected the plaintiff continued to ride motorcycles, went hunting and rode a mule, and ordered production of this information. In a closing footnote, the court stated it was confused as to why intervention was necessary since the parties agreed that at least some of the information was relevant. The court further noted the plaintiff should have reviewed his own Facebook account for potentially responsive information, only soliciting the court's assistance if a dispute remained.

Court Orders Defendants to Issue Litigation Hold Before Rule 26(f) Conference

Haraburda v. Arcelor Mittal USA, Inc., 2011 WL 2600756 (N.D. Ind. June 28, 2011).
In this employment discrimination suit, the plaintiff requested the court order the defendant to preserve e-mail evidence, claiming the defendant previously deleted e-mails from the plaintiff's account without her permission and refused to issue a litigation hold prior to the Fed.R.Civ.P. 26(f) meet and confer. The defendant argued the plaintiff's request was premature as Rule 26(d)(1) prohibits a party from seeking discovery before the Rule 26(f) conference. Disagreeing with the defendant's argument, the court noted Rule 26(d)(1) prohibits requesting production – not compelling preservation – and stated that ruling to the contrary would leave a party with knowledge of an intent to destroy evidence without a remedy. Accordingly, the court found the plaintiff could suffer measurable prejudice based on the suit's heavy reliance on e-mails if evidence was destroyed and ordered the defendant to implement a litigation hold.

Court Denies Motion to Dismiss Wiretap Allegations for Interception of Private Wi-Fi Data

In re Google Inc. St. View Elec. Commcns Litig., 2011 WL 2571632 (N.D. Cal. June 29, 2011).
In this class action litigation, the defendant moved to dismiss claims alleging violations of the federal Wiretap Act and various state wiretap statutes. Although the defendant admitted it had used "wireless sniffers" to intercept approximately 600 GB of information containing whole e-mails, usernames, passwords and other private data in over 30 countries, it argued the communications were sent over unencrypted Wi-Fi networks and were thus readily accessible to the general public as excepted under the Wiretap Act. In response, the plaintiff argued the readily accessible exception applied only to radio communications. Turning to the legisla-

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tive history to interpret the structure and intent of the Act, the court found the exception applied to all electronic communications rather than the more narrowly defined radio communications. But the court rejected Google's broader argument because Wi-Fi networks, like cellular communications, are designed to make intentional monitoring by third parties difficult. Absent the use of "rare packet sniffing software" – a technology not possessed by the general public – the court found that intercepting information over Wi-Fi networks would be extremely difficult, and thus falls outside the readily accessible exception. Accordingly, the court denied the motion to dismiss the federal wiretap allegations.

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Is Trickery a Legitimate Way to Apprehend Alleged Deadbeat Dads?

Question for LBW readers: Is it OK or not OK for law enforcement to use trickery to track down fathers with outstanding warrants alleging unpaid child support?

You hear about this type of "deadbeat dad sting" operation every few years, but the most recent one carried out in Alabama used some almost irresistible bait to lure fathers into the police's trap: the promise of two free tickets to the 2011 Alabama-Auburn football game.

According to **Fox Sports South**, the Lee County, Ala., sheriff's department launched **Operation Iron Snare** in an effort to address some very large child-support warrants that were outstanding. The sting involved phony "You Have Won!" letters mailed to local residents who had such outstanding warrants, which announced that the recipients had been selected to receive free tickets to the Alabama-Auburn "Iron Bowl" game. Fox Sports reports that "to the astonishment of just about everyone, a dozen suspects showed up to collect their prize."

When they arrived at the storefront they were told to visit to claim their tickets, the faux-winners were greeted with celebratory balloons and banners decorating the location and cheering spectators. Once they ventured inside, however, they were taken to an area in the back of the storefront where they were quickly handcuffed by police. Even then, however, some of the duped and arrested men were still asking if they would be receiving the tickets.

In the days since video of the sting was made public, some commentators have criticized the operation as "**sleazy**" or even "cruel." Tom Fornelli of CBS Sports **writes that**,"Yes, they deserve what they're getting, but it just feels wrong." On the other hand, of course, the people being apprehended here have outstanding warrants and are wanted by authorities for alleged unpaid child support. Please check out the video below and offer your thoughts in the comments. Is this type of sting OK? Not OK? What do you think?

Things You Can't Do on a Plane: Vol. 1

I seem to see a fresh "Trouble on a Plane" story every day, so I think it is time to launch a new LBW series on "Things You Can't Do on a Plane" for the benefit of all of you air travelers. Here is Volume 1:

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Strip naked. You may not strip naked on a plane, become disruptive and then lock yourself in a toilet. That is prohibited. CONSEQUENCE: The pilot may turn the plane and its 110 passengers back to the airport, even if it just took off.

Say the "F-word." No matter how frustrated you may be about your plane's delay in taking off due to a problem with the overhead compartments, you may not drop an "F-bomb" as an "intensifier" when you are complaining to yourself (e.g., "What the f--- is taking so long!"). CONSEQUENCE: If your F-bomb is overheard by a flight attendant, the airline may summon police aboard to escort you off of the flight.

Engage in a fistfight when the person in the seat in front of you reclines his seat. Passengers may not assault the person in front of them for reclining his or her seat. This is strictly prohibited. CONSEQUENCE: The pilot may return the plane to the airport, escorted by a pair of F-16 fighter jets.

Things You Can't Do on a Plane: Vol. 2

I just posted "**Things You Can't Do on a Plane: Volume 1**" less than two weeks ago, but already it is time for Volume 2. Here are more things I've recently learned that you cannot do on a plane:

Pretend to be a soldier to get an upgrade to first class seating. You may not dress up like a soldier with camo fatigues, a military-style buzz cut and fake dog tags in order to get bumped to first class. CONSEQUENCE: You may be arrested and charged with the crime of "second-degree impersonation."

Send a text message to all passengers seated in the premium economy section reading, "Get up, you c*ts." This prohibition applies to flight attendants, who may not send a message reading "Get up, you c***ts" (rhymes with "hunts") to the TV screens of all passengers in premium economy. CONSEQUENCE: Possible termination of employment for flight attendants and refunds/compensation for recipients of message.**

Bash your flight crew over an open mic for being "gays and grannies." This prohibition applies to pilots, who may not complain on an open mic broadcasting over the air traffic control radio frequency that their 12 person flight crew is made up of 11 homosexuals and and a "granny." CONSEQUENCE: The pilot may be suspended without pay.

Things You Can't Do on a Plane: Vol. 3

Now that I am on the lookout, it is becoming clear to me that there are an infinite number of things you cannot do on a plane (in case you missed them, here are **Volume 1** and **Volume 2** of Things You Can't Do on a Plane).

Here are three more things I've recently learned that you cannot do on a plane:

Inhale from an electronic cigarette and then throw bags of snacks at flight attendants. You may not inhale from an electronic cigarette during

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the flight, nor may you throw bags of peanuts and pretzels at the flight attendants who enforce the ban on inhaling from an electronic cigarette. CONSEQUENCE: You may be "greeted" by FBI agents when your plane lands and arrested and charged with "interference with a flight crew."

Bring a stun gun on board the plane with you. This prohibition applies even if you leave the stun gun behind in the seatback pocket when you deplane. CONSEQUENCE: The FBI and the Transportation Security Administration will very much want to speak with you.

Allow a scorpion to sting one of your passengers mid-flight. This prohibition applies to all airlines, even those that fly to low-scorpion-risk areas such as Alaska Airlines. CONSEQUENCE: 4,000 frequent-flier miles and two round-trip tickets offered to the scorpion attack victim.

Things You Can't Do on a Plane: Vol. 4

You might think that after **Volume 1**, **Volume 2** and **Volume 3** of Things You Can't Do on a Plane, that we'd be all out of things you can't do on a plane. Nope! The list grows daily.

Here are three more things I've recently learned

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that you cannot do on a plane:

Take a photograph of unhelpful airline ticket agents' nametags. You may not take a photo of the nametag of airline employees who you believe are not helpful or rude. CONSEQUENCE: You may be threatened with being arrested and put on the "no-fly list."

Wear short denim shorts that make it unclear whether you are wearing panties. This is particularly true if you accompany such shorts with a baggy t-shirt. CONSEQUENCE: You may be kicked off the plane for dress code violations.

Have three dozen drinks during the flight, and then strike and break the glasses of the police officer who attempts to escort you off of the plane. You may not have roughly 36 drinks and become disorderly mid-flight, and then strike the police officer when he attempts to obtain your identification. CONSEQUENCE: Possible misdemeanor charges of resisting arrest, disorderly conduct, and assault and battery on a police officer. (You also might want to refrain from telling the police sergeant booking you: "You think I'm cute and I think you're cute, just drive me home.")

Things You Can't Do on a Plane: Vol. 5

You might think that after **Volume 1**, **Volume 2**, **Volume 3** and **Volume 4** of Things You Can't Do on a Plane, that we'd be all out of things you can't do on a plane. Nope! The list grows daily. Here are three more things I've recently learned that you cannot do on a plane:

Cry, softly, about your father's heart attack. You may not cry about your father's heart attack, particularly if you accompany such crying by asking the flight attendant for a glass of wine. CONSEQUENCE: Removal from the flight (of both you and your sister).

Have a bat on board. No, not a baseball bat -- we're talking about the winged type of bat here. If such a creature makes its way on board a flight and is flying around the cabin, do not count on getting to your destination as planned. CONSEQUENCE: Flight will be turned around and plane returned to airport for bat removal, even if bat has already been trapped in the lavatory.

Receive oral sex from a flight attendant in the cockpit. Pilots may not receive oral sex from flight attendants in the cockpit. CONSEQUENCE: "Full investigation" by the airline.